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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 605

PHIL S. COHEN, ALIAS P. H. PHILLIPS, AND LEO ESCOVITCH, ALIAS LEO ESCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 513-518) is reported at 178 F. 2d 588.

JURISDICTION

The judgment of the Court of Appeals was entered November 30, 1949 (R. 509-510), and a petition for rehearing (R. 525-535) was denied January 16, 1950 (R. 539). The petition for a writ of

certiorari was filed February 14, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the documents involved in this case constitute false statements within the meaning of Section 512(a) of the National Housing Act.

2. Whether the fact that innocent instrumentalities intervened between petitioners and the presentation of false statements to the Federal Housing Administration exculpates them from liability for causing such false statements to be made and uttered.

STATUTE INVOLVED

Section 512(a) of the National Housing Act of June 27, 1934, c. 847, 48 Stat. 1265, as amended by the Act of February 3, 1938, Sec. 9, 52 Stat. 24, 12 U. S. C. 1731(a), provides in pertinent part as follows:

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the

> action of the said Administration under this Act, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, * * * shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both.

STATEMENT

In count 1 of an indictment in eight counts, petitioners were charged under 12 U. S. C. 1731(a) with having made, passed, uttered and published and having caused to be made, passed, uttered, and published a document entitled "FHA Title I Credit Application," signed by Elmo and Gertrude Ray, for the purpose of obtaining a loan from the First Discount Corporation, Dayton, Ohio, to finance home improvements, with the intent that such loan would be offered to the FHA for insurance and for the purpose of influencing the action of the FHA, knowing that such document was false in that the signatures were obtained by fraud and misrepresentation, that the Rays did not intend to apply for an advance of credit, and that the document was submitted to the First Discount Corporation without the Rays' knowledge or consent. In count 2 petitioners were charged with having made, passed, uttered, and published and having caused to be made, passed, uttered and published an "FHA Promissory Note," signed by the Rays, for the purpose of obtaining a loan from the First Discount Corporation with the intent that such loan should

be offered to the FHA for insurance, and for the purpose of influencing the action of the FHA, knowing the note to be false in that the signatures were obtained by false and fraudulent representations and that at the time of signing it the Rays did not know it was a promissory note. Charges similar to counts 1 and 2 were contained in counts 3 and 4, relating to petitioners' dealings with Clifton and Geneva Hager, and in counts 5 and 6, regarding their transactions with Marvin and Lillie Willett. In counts 7 and 8, relating to transactions with Walter and Mary Propolski, petitioner Escovitch and one Bernie Bender were named as defendants [1] and the lending agency involved was Commercial Credit Corporation, Dayton, Ohio. (R. 1-7.)

A motion to dismiss the indictment was overruled prior to the trial (R. 438-439).

In all four transactions—with the Rays, the Hagers, the Willetts, and the Propolskis—the overall pattern of operation was essentially similar. The dealings petitioners had with the Rays are typical. Petitioners, after going unsolicited to the Ray home, stated that they wanted to put a composition siding on Ray's frame house for advertising or display purposes. The Rays were merely to show the refinished home to prospective customers and there would be no cost whatever to them

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[1] Before trial, Bender pleaded guilty to counts 7 and 8 (R. 424).

for the new siding. Petitioners represented that the Rays would receive a check for $25 from the Dayton Construction Company, which was to furnish the siding, for each customer obtained as a result of displaying the siding job on their home and that they would pay back to the company approximately $22 of each such payment they would receive. Petitioners represented that in this way the job would be paid for within 13 weeks. (R. 10-12, 49-50, 53, 60-61, 82.) At the insistence of petitioners, Ray and his wife signed in blank an FHA Title I Credit Application form (R. 447) and an FHA Promissory Note form (R. 449-450). Escovitch told Ray that he should sign one paper, which turned out to be the FHA credit application, "just to show that you are the man that is getting this job" (R. 14). Since there were other papers on top of the credit application so that he could not see the designation at the top—"FHA Title I Credit Application, Property Improvement Loan" —and since he was merely told to sign where the "X" was, Ray signed the paper without knowing what it was (R. 17). He placed on it only his signature, and did not ask anyone to fill in any blank spaces (R. 18). Similarly, he did not see the designation "FHA Promissory Note" on the other document and did not know that he was signing a promissory note (R. 21, 22). Ray's wife was also unaware that she was signing an FHA credit application or a promissory note (R. 76-77). The

work on the house was finished about four or five days after these transactions with petitioners (R. 22). After the work was completed the Rays also signed an "FHA Borrower's Completion Certificate" (R. 451) for Abe Rosenthal, the supply man who was doing business as the Dayton Construction Company (R. 21). Rosenthal entered into a contract with petitioners to pay them $330.90 as their brokerage commission for obtaining the Ray job (R. 452-453). When the promissory note form was taken to Rosenthal it bore only the Rays' signatures, so his bookkeeper filled in the blank spaces, including the amount of $827.28, which was arrived at by using the FHA interest chart to ascertain the total amount to be repaid upon a loan in the amount of $720 as stated in the application (R. 114-116). After the First Discount Corporation approved the loan application and note, it paid Rosenthal $720, $330.90 of which he paid to petitioners in separate checks of $165.45 as their agreed commissions (R. 117-119). After the Rays defaulted on the note, the First Discount Corporation filed a claim with the FHA, which reimbursed it for the full amount of the loan (R. 287).

With some variations, the Hager (R. 151-242), Willett (R. 242-293), and Propolski (R. 293-369) transactions were consummated in the same manner. Hager was unable to read or write and could only sign his name (R. 157-158). When his wife started to read the papers, petitioner Cohen, using

the alias Phillips, "got up and got her by the shoulders and wouldn't let her read them; told her to go ahead and sign the papers and she would be glad of it" (R. 181, 208). When Willett and his wife "asked if there was a note or any application for loan connected with it in any way, form or fashion * * * they [petitioners] said no" (R. 247). In the Propolski transaction, in which the supply man was one Barton doing business as Federal Construction Company (R. 332) and the loan company was Commercial Credit Corporation, even though the house was owned by Propolski's brother (R. 294), Escovitch, using the alias Esco, stated this did not make any difference (R. 296, 323). Although Commercial Credit Corporation's records showed that Barton made eight payments on the Propolski loan (R. 354), the note was later defaulted and Commercial Credit was reimbursed by the United States in the amount of $1,153.65 (R. 355-356). Reimbursement after default was also made on the Hager and Willett notes (R. 287).

Petitioner Cohen was found guilty on the first six counts and petitioner Escovitch guilty on all eight counts (R. 440). Each petitioner was sentenced to terms of imprisonment aggregating four years and to pay a fine of $3,000 (R. 441-444). The Court of Appeals affirmed the convictions (R. 513-518).

ARGUMENT

1. Petitioners contend (Pet. 29-34) that the indictment does not charge offenses within 12 U. S. C.

1731(a) because it is charged that the signatures on the credit applications and notes were obtained by fraud and misrepresentation, whereas the statute applies only to "false" statements. They argue that the statute does not extend to documents obtained in the manner alleged in the indictment and, in addition, that in any event the notes were "not necessarily * * * false in law" (Pet. 34) because the makers might be estopped by reason of negligence from setting up the defense of fraud (Pet. 33).

Such limited construction of the word "false" as used in the statute is wholly unwarranted. In a very real sense the credit applications and notes were, as the indictment alleged and the proof showed, false documents. They were not what they purported to be, for the victims of petitioners' fraud did not know what they were signing and did not intend to apply for loans or sign notes, but were induced to sign the papers solely by petitioners' misrepresentations.

The enforceability of the notes against the makers is immaterial to the question of the falsity of the documents within the meaning of the statute. We are not here concerned with the liability of the makers on the notes they signed. The statute was designed to protect the Government against fraud in the procurement of insurance of home loans. Petitioners' offense was complete when they caused the false documents to be uttered for the purpose of

influencing the action of the FHA and obtaining insurance.[2]

2. Petitioners also contend that since the suppliers and the lending institutions, over which they had no control, intervened between them and the presentation of the loans to the FHA for insurance, they cannot be held accountable for such presentation (Pet. 19-24); that their acts were not criminal at the time of their commission and would not be made so by the acts of other independent parties (Pet. 24-29). In this connection, they also argue that the proof was insufficient to show that they intended the loans to be offered to the FHA for insurance (Pet. 34-36).

As the Court of Appeals pointed out (R. 517-518), the jury were entitled to infer from petitioners' possession and repeated use of forms "bearing in large letters the well-known symbol 'FHA'" that their purpose was to cause a loan to be made which would be offered to the FHA for insurance. Indeed, there is no other rational explanation of their use of the FHA forms. Further proof that such was their intent is found in the provision in

[2] Petitioners say that following their conviction the Government sued the Propolskis on the note involved in count 8, and they argue, in effect, that such an effort to hold the makers liable in some way forecloses prosecution under 12 U.S.C. 1731(a) (Pet. 18-19). But there is no inconsistency between this prosecution and civil suits on the notes on the theory that the makers were bound by their signatures. Whether they are liable on their notes depends upon the law of negotiable instruments and, even if we assume that they are liable, this would not exculpate petitioners from liability under the criminal statute.

their contracts with Rosenthal that they would not be paid their brokerage fees until the contracts were "approved by the proper financial institution, who will finance the materials to be furnished and the work to be done under and by virtue of" the contracts (R. 452, 462, 477, 478). The inference is thus clear that petitioners knew that FHA insured loans would be consummated through a lending agency.

The same evidence shows that petitioners effectively caused the loans to be presented to the lending institutions and then to the FHA for insurance. Assuming that the offenses under the statute were not complete until the loans were offered to the FHA for insurance, it does not follow, as petitioners contend, that the intervention of innocent agents in the consummation of the offenses exculpates them. For the statute expressly covers the causing of the prohibited acts, and petitioners' conduct in fraudulently obtaining the credit applications and notes and turning them over to their suppliers was the actuating cause in the chain of events leading to the presentation of the loans for insurance, as they intended would be done. Cf. *United States* v. *Sheridan,* 329 U. S. 379, 391.[3]

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[3] See also Section 2(b) of the 1948 revision of Title 18, U. S. C., which provides that "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such." The Reviser's Note says that this provision "removes all doubt that one who puts in motion or assists in the

Terry v. *United States,* 131 F. 2d 40 (C. A. 8), upon which petitioners principally rely and which involved facts analogous to those here, was a prosecution under Section 35(A) of the Criminal Code, 18 U. S. C. (1946 ed.) 80, the so-called false claims statute, for making and causing to be made certain false statements in a matter within the jurisdiction of the FHA and is for that reason readily distinguishable. The court there held that such a prosecution would not lie under Section 35(A) because the FHA "had no cognizance of the * * * loan transaction on which the indictment rests at the time of the commission of the acts charged against defendant in respect to that transaction. Whether the Administration would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission may be converted into a crime at a subsequent time by the independent action of other persons" (p. 44). But the court also pointed out that in a proper case such a prosecution would lie under 12 U. S. C. 1731(a), the statute involved here, for it said (p. 44):

> It is very plain that the act here charged against the defendant, of making and causing

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illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense."

to be made and using and causing to be used a certificate containing fraudulent statements, was the kind of an act particularly in contemplation of Section 1731, but Congress was at pains to make it punishable by federal authority only in the cases where it manifestly ought to be so punished, i.e., in the cases where the intent to affect the exercise of federal authority exists.

CONCLUSION

There is no conflict of decisions, and no questions are presented meriting further consideration by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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